

Original filed 10/20/06

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICKEY LOUIS ALFORD, a.k.a.
Morris Day,

Plaintiff,

vs.

DR. WINN, et al.,

Defendants.

No. C 06-4442 JF (PR)

ORDER TO SHOW CAUSE
RE: DISMISSAL PURSUANT
TO 28 U.S.C. § 1915(g)

(Docket No. 3)

Plaintiff is a state prisoner and frequent litigant in this court. He filed a pro se civil rights action against several psychologists and psychiatrists concerning his mental competency trial in Monterey Superior Court. Plaintiff has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

DISCUSSION

The Prison Litigation Reform Act of 1995 (“PLRA”), which was enacted on April 26, 1996, provides that a prisoner may not bring a civil action or appeal a civil judgment under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to

1 state a claim upon which relief may be granted, unless the prisoner is under imminent
 2 danger of serious physical injury.” 28 U.S.C. § 1915(g). Because § 1915(g) is a
 3 procedural rule that does not raise retroactivity concerns, cases which were dismissed
 4 before the effective date of § 1915(g), i.e., April 26, 1996, may be counted as qualifying
 5 dismissals or “strikes.” See Tierney v. Kupers, 128 F.3d 1310, 1311-12 (9th Cir. 1997).

6 For purposes of a dismissal that may be counted under § 1915(g), the phrase “fails
 7 to state a claim on which relief may be granted” parallels the language of Federal Rule of
 8 Civil Procedure 12(b)(6) and apparently means the same thing. Andrews v. King, 398
 9 F.3d 1113, 1121 (9th Cir. 2005). A case “is frivolous if it is ‘of little weight or
 10 importance: having no basis in law or fact.’” Id. (citation omitted). “A case is malicious
 11 if it was filed with the ‘intention or desire to harm another.’” Id. (citation omitted). “Not
 12 all unsuccessful cases qualify as a strike under § 1915(g). Rather, § 1915(g) should be
 13 used to deny a prisoner’s IFP status only when, after careful evaluation of the order
 14 dismissing an action, and other relevant information, the district court determines that the
 15 action was dismissed because it was frivolous, malicious or failed to state a claim.” Id.
 16 The prisoner must be given notice of the potential disqualification under § 1915(g) -- by
 17 either the district court or the defendants – but the prisoner bears the ultimate burden of
 18 persuasion that § 1915(g) does not bar pauper status for him. Id. Andrews thus
 19 implicitly allows the court to sua sponte raise the § 1915(g) problem, but requires the
 20 court to notify the plaintiff of the earlier dismissals it considers to support a § 1915(g)
 21 dismissal and allow the plaintiff an opportunity to be heard on the matter before
 22 dismissing the action. See id. at 1120.

23 A review of the dismissal orders in Plaintiff’s prior prisoner actions in this Court
 24 reveal that he has had at least three such cases dismissed on the grounds that they were
 25 frivolous, malicious, or failed to state a claim upon which relief may be granted. See Day
 26 v. Feinstein, C 96-1796-FMS (dismissed as frivolous); Alford v. Johnson, C 05-1352 JF
 27 (PR) (dismissed for failure to state a claim); Alford v. Sony Electronic Inc., C 05-1581 JF
 28 (PR) (dismissed for failure to state a claim). In light of these dismissals, and because

1 Plaintiff is not under imminent danger of serious physical injury, he is ordered TO
2 SHOW CAUSE within **thirty days** of the date this order is filed, why this action should
3 not be dismissed pursuant to 28 U.S.C. § 1915(g).¹

4 IT IS SO ORDERED.

5 DATED: 10/20/06


JEREMY FOGEL
United States District Judge

27 ¹ The Court notes that such a dismissal would be without prejudice to bringing it in a paid
28 complaint. See Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir. 1996).

1 A copy of this ruling was mailed to the following:

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